80-713

No. ——

Supreme Court, U. S.
FILED
OCT 31 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN THE MATTER OF: HURON DIE CASTING, INC.,
Bankrupt
HURON DIE CASTING, INC., AND
NAG ENTERPRISES, INC.,
Petitioners,
v.
CREDITORS' COMMITTEE OF HURON DIE CASTING, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Bankruptcy Judge err in entering the ex parte Order Reopening the Estate of the bankrupt, Huron Die Casting, Inc., based upon an application which merely alleged, without more, "that there may be assets which belonged to the bankrupt corporation that were not administered" and this application allege any facts to establish the "good cause" required by 11 USC 11(a)(8) for the reopening of the estate of the bankrupt, Huron Die Casting, Inc.?

2. Did the Bankruptcy Judge err in ordering the reopening of the estate of Huron Die Casting, Inc. and denying the Motion to Set Aside the Order Reopening Estate, when the Order Reopening Estate and denial of the Motion was based upon an Amended Application to Reopen the Estate which had not been filed and was not before the Bankruptcy Judge at the time of the Order Reopening Estate and the denial of the Motion?

3. Did the Amended Application to Reopen the Estate which alleged an interest by the bankrupt (Huron Die Casting, Inc.) arising from the purchase by NAG Enterprises, Inc. from Meridian Industries, Inc. of the stock of Huron Die Casting, Inc. and assets of Meridian Industries, Inc. allege sufficient facts to establish "good cause" for reopening the estate of the bankrupt, Huron Die Casting, Inc.?

4. Is the bankruptcy court required by the Due Process Clause to grant an evidentiary hearing to determine the grounds for reopening an estate after an interested party has objected to the reopening of an estate by ex parte order?

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CREDITORS' COMMITTEE OF HURON DIE CASTING, INC.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Now come Petitioners Huron Die Casting, Inc., and NAG Enterprises, Inc., by their attorneys, August, Thompson, Sherr & Miller and their of counsel attorneys, Hardig, Goetz, Heath & Merritt, and pray that this Court issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on July 31, 1980.

OPINIONS BELOW

The Bankruptcy Court, Eastern District of Michigan, Southern Division, upon ex parte application issued its Order Reopening Estate, without opinion (App, p 13). The Bankruptcy Court issued its Order Denying Motion to Set Aside Order and to Quash Subpoenas, also without opinion (App, pp 14-15).

The United States District Court, Eastern District of Michigan, Southern Division, issued its Order Affirming Decision of Bankruptcy Judge to Reopen the Estate, and Dismissing Appeal, without opinion (App, p 16).

In its Order and Opinion the Court of Appeals for the Sixth Circuit affirmed the District Court. The Opinion is unreported and is printed in the Appendix at page 17-20. The Court of Appeals denied rehearing in an unreported Order (App, p 20).

JURISDICTION

The Judgment of the United States Court of Appeals was entered on July 31, 1980 (App, pp 17-20). A Petition for Rehearing was denied on September 17, 1980 (App, p 20). Jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND COURT RULE INVOLVED

The constitutional provision involved is the Due Process Clause of the 5th Amendment, which reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The statute involved is 11 USC 11(a)(8), which reads:

"§ 11. Creation of courts of bankruptcy and their jurisdiction

(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to —

(8) Close estates, by approving the final accounts and discharging the trustees, whenever it appears that the estates have been fully administered or, if not fully administered, that the parties in interest will not furnish the indemnity necessary for the expenses of the proceeding or take the steps necessary for the administration of the estate; and reopen estates for cause shown;"

The court rule involved is Rules of Bankruptcy Procedure, Rule 515, which reads:

> "A case may be reopened on application by the bankrupt or other person to administer assets, to accord relief to the bankrupt, or for other good cause. The application shall be filed with the clerk of the district court having custody of the papers in the case. The case shall be referred forthwith for action on the application and for further proceedings therein."

STATEMENT

On December 11, 1974, Huron Die Casting, Inc. ("Huron") filed a Voluntary Petition in the Bankruptcy Court for the Eastern District of Michigan. The Bankruptcy Court jurisdiction was invoked under Chapter 11 of the Bankruptcy Act, and Huron subsequently was adjudged a bankrupt. A creditors committee was formed, and all the assets of the bankrupt were liquidated. By order of the Bankruptcy Courts for the Eastern District of Michigan, the estate was closed on November 19, 1976.

On May 3, 1977, Arthur H. Rice of the firm of Rice, Rice and Gilbert, the law firm representing the Creditors Committee for Huron, filed his Application to Reopen Estate, based solely on his own affidavit (App, pp 21-24).

The application merely alleged on the information and belief of Arthur H. Rice that there might be assets which the bankrupt failed to reveal. Rice made the following allegations in the application (App, pp 21-22):

> "4. That your petitioners are advised and do verily believe that there may be assets which

belong to the bankrupt corporation which were not administered during the liquidation proceedings in this estate. More particularly, your petitioners allege upon information and belief, that this estate may have an interest in certain assets which were not disclosed by the bankrupt to the Court.

4.5 That your petitioners further allege that the facts and circumstances surrounding the concealment of these assets are within the knowledge of Basil M. Briggs, former President and Chief Officer of Meridian Industries, Inc., and Noel A. Gage, either as an officer, director or principal stockholder of NAG Enterprises, Inc., and such facts will be fully disclosed upon examination of the above individuals and such other third parties or agents of Meridian Industries, Inc. and NAG Enterprises, Inc., upon appropriate examination under Rule 205 of the U.S. Bankruptcy Rules."

The application also asks the Bankruptcy Court to compel Gage and Briggs to appear in Court. They were asked to bring with them:

"All books, records, documents and papers of NAG Enterprises, Inc. concerning:

(a) The purchase by NAG Enterprises, Inc. from Meridian Industries, Inc. of the stock of Huron Die Casting, Inc.;

(b) The acquisition by NAG Enterprises, Inc. of the various assets of Meridian Industries, Inc. including a Promissory Note dated March 20, 1974 from All State Industries, Inc. to Meridian Industries, Inc.; and

(c) Any and all other documents, papers and records concerning any of the above matters."

On June 2, 1977, Huron filed a Motion to Set Aside the Order Reopening the Estate and also sought to quash the subpoenas so issued. Huron pointed out that Rice had merely alleged, upon information and belief, that the estate *may* have an interest in certain assets and that Gage and Briggs knew about it.

Harry G. Hackett, Bankruptcy Judge, on June 22, 1977, denied the Motion, without opinion. Order Denying Motion to Set Aside Order and to Quash Subpoenas (App, pp 14-15). Judge Hackett apparently agreed that the application was insufficient, but nevertheless he unconditionally opened the estate. Thereupon he (Order Denying Motion to Set Aside Order and to Quash Subpoenas, App, p 15):

> "Ordered that the Creditors Committee of the bankrupt, Huron Die Casting, Inc., by and through its attorneys, Rice, Rice & Gilbert, file an amended application to reopen this estate by June 24, 1977, enlarging the details of the alleged unadministered assets which are the basis for its application to reopen this estate."

Judge Hackett made no provision for further examination of the sufficiency of the application. The Judge provided no guidelines as to the nature of the additional facts to be alleged. He issued no order regarding the subpoena issued to Gage and Briggs.

No evidentiary hearing was held on the factual basis for the ex parte Order Reopening Estate.

On June 22, 1977, after both the Order Reopening Estate and the Order Denying Motion to Set Aside Order and to Quash Subpoenas were entered by Judge Hackett, the Creditors' Committee filed an amended application as ordered by Judge Hackett. Although

ordered to file an Amended Application "enlarging the details of the alleged unadministered assets" the Creditors Committee merely added the following language (Amended Application to Reopen Estate, App, p 25):

> "4. . . .More particularly, your petitioners allege upon information and belief, that this estate may have an interest in certain assets which were not disclosed by the bankrupt to the court, more particularly as follows:
> (a) The purchase by NAG Enterprises, Inc. from Meridian Industries, Inc. of the stock of Huron Die Castings, Inc., and
> (b) The acquisition by NAG Enterprises, Inc. of the various assets of Meridian Industries, Inc., including a Promissory Note dated March 20, 1974 from All State Industries, Inc. to Meridian Industries, Inc."

The bankrupt, Huron was not a party to the transactions between NAG Enterprises, Inc. ("NAG") and Meridian Industries, Inc. ("Meridian"). The Creditors Committee made no attempt to explain how the sale by Meridian to NAG of Huron stock or a promissory note from All State Industries, Inc. ("All State") to Meridian could constitute an "undisclosed asset" of the bankrupt, Huron.[1]

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[1] Meridian, a company publicly traded on the American Stock Exchange had two subsidiaries, All State and Huron, both of which were in perilous financial condition.

There were two transactions involved. The first involved the acquisition of the common capital stock of Huron. NAG obtained the stock of Huron, made loans for the benefit of Meridian and

(cont'd. on following page)

Although ordered by Judge Hackett to "enlarge the details of the alleged unadministered assets which are the basis for its application to reopen the estate," the Creditors Committee alleged no new facts beyond what the original application had already incorporated in the subpoena to an individual, Noel Gage.

The bankrupt appealed from Judge Hackett's Order to the United States District Court for the Eastern District of Michigan. District Judge James Churchill, without opinion, rendered his Order Affirming Decision of Bankruptcy Judge to Reopen the Estate, and Dismissing Appeal dated July 14, 1978 affirming the decision of Judge Hackett (App, p 16).

Upon appeal to the United States Court of Appeals to the Sixth Circuit, the Court affirmed the judgment of the District Court in its Order dated July 31, 1980 (App, pp 17-20). The Petition for Rehearing was denied on September 17, 1980 (App, p 20).

(cont'd. from preceding page)

assumed certain indebtedness. Huron was later adjudicated a bankrupt and it is Huron's estate which is the subject of this petition.

As to All State, NAG obtained a promissory note of All State, which defaulted on the note. There is currently an action in state court on this note. All State has also been adjudicated a bankrupt; however, the status of its estate has not been challenged.

Although in the case at bar neither the original or amended application requesting the reopening of the Huron bankruptcy estate set forth specific facts demonstrating "good cause" to reopen the estate, it is apparent that the transaction sought to be reviewed is the same transaction before the state court, namely, the status of the note from All State, a transaction which did not involve Huron.

REASONS FOR GRANTING THE WRIT

1. This Court should grant the Writ of Certiorari because of the diverse views of the Circuits regarding the proper procedure and grounds for reopening a bankruptcy estate.

As indicated in *In Re Thomas*, 204 F.2d 788, 790-791 (7th Cir, 1953) Congress has:

> ". . . prescribed no formal procedure to be followed in the reopening of an estate. The statute is silent as to the requisite cause, the manner by which or the parties by whom 'cause' may be called to the attention of the court."

Although the Seventh Circuit was referring to the Bankruptcy Act as amended in 1938 (11 USC(a)(8)), Congress is equally silent in the present Bankruptcy Act (11 USC 350 reprinted at App, p 27).

As might be expected in light of the statutory language that bankruptcy estates may be reopened "for cause shown" the Circuits have been diverse in their views of the proper procedure for reopening an estate.

The Eighth Circuit in the case of *In Re Newton*, 107 F. 429, 431 (8th Cir, 1901) stated that the petition to reopen bankruptcy estate once closed need not ". . . be of any formal or technical character." The Court went on to say that the petition (emphasis supplied):

> ". . . must be either in itself, *or* in connection with supporting affidavits, of such persuasive character as to reasonably satisfy the court of the requisite jurisdictional fact, namely, that there are some assets belonging to the bankrupt which have not been administered."

Although the Court criticized the petitioner for not reinforcing the petition to reopen by supporting affidavits, the Court held that if the petition itself were persuasive enough, no supporting affidavits were necessary to reopen the estate. The *Newton* case has been quoted with approval by the Ninth Circuit. *In Re Snyder*, 4 F.2d 627, 628 (9th Cir, 1925), cert. den. 269 US 556.

Contrary to the Eighth and Ninth Circuits and relying upon this Court's opinion in *Kinder* v *Scharff*, 231 US 517 (1913) the Second Circuit stated (*Sterling National Bank & Trust Co.* v *Boyajian*, 127 F.2d 713, 715 (2nd Cir, 1942)) (emphasis supplied):

> "In the case at bar a hearing [on the petition to reopen an estate] based solely on conflicting affidavits was about as inconclusive as would have been one on ex parte affidavits. We think the determination of whether the bank's alleged cause of action has a reasonable prospect of producing any unadministered assets and whether it exercised diligence in asserting a claim, the basis of which was perhaps within its knowledge or might easily have been didcovered, *ought to be reached after an oral hearing in which there will be an opportunity to examine and cross examine witnesses.*"

Although the Court of Appeals relied upon the *Sterling National Bank* case in its Order (App, p 19), the Court did not remand for "a more adequate hearing" as in *Sterling National Bank* even though no evidentiary hearing was ever held in the case at bar.

2. The procedure of allowing the reopening of a bankruptcy estate upon ex parte pleadings set forth

upon information and belief without the requirement of an evidentiary hearing following an objection to the reopening of the estate raises an important question whether the procedure in this case satisfies the Due Process Clause of the 5th Amendment.

In a slightly different context, this Court has held that the opportunity for an immediate hearing upon objection to an ex parte order is necessary to satisfy the Due Process Clause of the 14th Amendment. *North Georgia Finishing, Inc.* v *Di-Chem, Inc.*, 419 US 601 (1975); *Mitchell* v *W.T. Grant Co.*, 416 US 600 (1974); *Fuentes* v *Shevin*, 407 US 67 (1972). If an immediate hearing upon objection to an ex parte order is required of state courts under the 14th Amendment then such a hearing ought to be required of Federal Courts under the 5th Amendment.

In the case at hand, although there was argument by counsel for the bankrupt on its Motion to Set Aside the Order Reopening Estate, no evidentiary hearing was held to determine whether there was sufficient cause or grounds to conclude that the estate should be reopened, as mandated in the Second Circuit in *Sterling National Bank & Trust Co.* v *Boyajian, supra.*

3. The procedure for reopening the bankruptcy estate is a question important to the administration of the bankruptcy laws. The Court has long recognized that the chief purpose of the bankruptcy laws is the "... prompt and effectual administration and settlement of the estate of all bankrupts within a limited period." *Ex Parte Christy*, 3 How. 292, 312 (1845); *Katchen* v *Landy*, 382 US 323, 328 (1966). To allow bankruptcy estates to be reopened upon the ex parte applications, set forth upon information and belief, alleging that there *may* be unadministered assets

conflicts with the purpose of an effectual and final settlement of the estate within a limited period. Further this permits the rights of creditors who have relied on this finality to continue their business without the fear of having even unrelated transactions surreptitiously set aside by procedures less solicitous of due process rights than would be found in the trial courts.

CONCLUSION

Petitioners Huron Die Casting, Inc. and NAG Enterprises, Inc. respectfully request this Court to issue its Writ of Certiorari.

Respectfully submitted,

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AND

HARDIG, GOETZ, HEATH & MERRITT
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APPENDIX "A"

ORDER REOPENING ESTATE

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed May 5, 1977)

(In the Matter of: Huron Die Casting, Inc., Bankrupt. No. 74 95212 P)

At a session of said Court held in the Federal Building in the City of Detroit, State of Michigan, On 5-3-77. Present: Honorable Harrry G. Hackett, Bankruptcy Judge.

Upon the annexed application of Arthur H. Rice, attorneys for the Creditors Committee of Huron Die Casting, Inc., a Michigan corporation, praying this (sic) this estate and proceeding be reopened, and it appearing that no notice need be given and no adverse interest having been represented, and sufficient cause appearing therefor, it is hereby

ORDERED that the estate of the above-named bankrupt and this cause be, and the same hereby are, reopened.

IT IS FURTHER ORDERED that subpoenas be issued forthwith for the examination of Basil M. Briggs and Noel A. Gage, officers of said corporation, and that said matter be held at such time and place as set forth in said subpoenas.

IT IS FURTHER ORDERED that this Court grant such other further relief as it deems just and equitable.

/s/ Harry G. Hackett
Bankruptcy Judge

APPENDIX "B"

ORDER DENYING MOTION TO SET ASIDE ORDER AND TO QUASH SUBPOENAS

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed June 22, 1977)

(In the Matter of: Huron Die Casting, Inc., Bankrupt. No. 74 95212 H)

At a session of said Court held in the Federal Building in the City of Detroit, State of Michigan, On June 22, 1977. Present: Honorable Harry G. Hackett, Bankruptcy Judge.

This matter having come on to be heard on June 20, 1977, pursuant to a motion by the bankrupt, Huron Die Casting , Inc., to quash the subpoenas issued, and to set aside the Order of May 3, 1977 reopening this estate; and the Court having duly considered the oral arguments and the memorandum briefs filed by the parties through their respective counsel, and the court being fully advised in the premises,

NOW, THEREFORE, on the motion of Rice, Rice & Gilbert, attorneys for the Creditors Committee of the bankrupt, Huron Die Casting, Inc.,

IT IS HEREBY ORDERED that the Motion to Set Aside Order and to Quash Subpoenas filed by the bankrupt, Huron Die Casting, Inc., is hereby denied.

IT IS FURTHER ORDERED that the Creditors Committee of the bankrupt, Huron Die Casting, Inc., by and through its attorneys, Rice Rice & Gilbert, file an amended application to reopen this estate by June 24, 1977, enlarging the details of the alleged unadministered assets which are the basis for its application to reopen this estate.

IT IS FURTHER ORDERED that the 205 examinations of NAG Enterprises, Inc., Noel A. Gage and Basil Briggs, shall be adjourned from June 24, 1977 at 2:00 p.m. until July 25, 1977 at 10:00 a.m., and the subpoenas requiring the aforesaid NAG Enterprises, Inc., Noel A. Gage and Basil Briggs to appear on that date are continued in full force and effect requiring the appearance of the aforesaid witnesses on the aforesaid date.

/s/ Harry G. Hackett
Bankruptcy Judge

Approved:
AUGUST, THOMPSON, SHERR & MILLER
By: Irving A. August

Attorneys for the Bankrupt, Huron Die Casting, Inc., NAG Enterprises, Inc., and Noel A. Gage.

/s/ Joseph S. Random
Attorney for Basil Briggs

APPENDIX "C"

ORDER AFFIRMING DECISION OF BANKRUPTCY JUDGE TO REOPEN THE ESTATE, AND DISMISSING APPEAL

(United States District Court
Eastern District of Michigan
Southern Division)

(In the Matter of Huron Die Casting, Inc., Bankrupt. Civil No. 77-71613 Bankruptcy No. 74-95212-H)

At a session of said court held in the Federal Building and U.S. Courthouse, Detroit, Michigan, on July 14, 1978.

Present: Honorable James P. Churchill, United States District Judge.

The appeal of the decision of the bankruptcy judge to reopen the estate having been filed, briefs having been received and considered, and oral argument having been heard on July 14, 1978;

IT IS NOW ORDERED, for reasons stated on the record in open court, that the decision of the bankruptcy judge be and hereby is AFFIRMED, and this appeal is therefore DISMISSED.

/s/ James P. Churchill
United States District Judge

Entered: July 31, 1978

APPENDIX "D"

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed July 31, 1980)

(In the Matter of: Huron Die Casting, Inc., Bankrupt, Creditors Committee of Huron Die Casting, Inc., Petitioner-Appellee, v. Huron Die Casting, Inc. and NAG Enterprises, Inc., Respondents-Appellants. No. 78-1473)

Before: Edwards, Chief Judge; Weick and Martin, Circuit Judges.

This is an appeal from an order of the bankruptcy judge reopening the estate of the bankrupt, appellant Huron Die Casting, Inc. (Huron). Joining Huron on appeal in NAG Enterprises, Inc., which had acquired the common capital stock of Huron. The bankruptcy judge denied Huron's motion to set aside the order on the condition that the Creditors' Committee file an amended application to reopen. The District Court thereafter affirmed the decision of the bankruptcy judge. The main question here is whether the amended application alleged sufficient facts upon which to order the reopening of the estate. We affirm.

In 1973 and 1974, Meridian Enterprises, Inc. (Meridian) attempted to revitalize several of its struggling subsidiaries, one of which being Huron. NAG Enterprises and Meridian reached an agreement whereby NAG Enterprises acquired Huron's common capital stock, made loans for Meridian's benefit, and

and assumed certain indebtedness. In exchange, Meridian assigned to NAG Enterprises a $700,000 promissory note from All State Industries, which eventually defaulted on the note. NAG sued to recover and obtained a default judgment against All State and summary judgment against Meridian for $611,000. The status of the promissory note is still being litigated in the Michigan state courts. In December, 1974, Huron filed a voluntary petition in bankruptcy and was subsequently adjudicated a bankrupt. A Creditor's Committee was formed to liquidate its assets; the estate was closed in November, 1976.

In the spring of 1977, the law firm representing the Creditor's Committee learned of some Huron assets that were possibly not administered. An application to reopen the estate was then filed.[1] The bankruptcy judge found the application insufficient, but nevertheless denied Huron's motion to quash subpoenas and set aside the order reopening on the condition that the Committee file an amended application to reopen. The court asked for more details concerning the alleged unadministered assets.

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[1] 11 U.S.C. § 350(b), formerly 11 U.S.C. § 11(a)(8), reads as follows:

> [A] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

Bankruptcy Rule 515 provides:

> A case may be reopened on application by the bankrupt or other person to administer assets, to accord relief to the bankrupt, or for other good cause. The application shall be filed with the clerk of the district court having custody of the papers in the case. The case shall be referred forthwith for action on the application and for further proceedings therein.

The appellants contend that the amended application alleged no new facts or details beyond that incorporated in the subpoena to Noel Gage, the owner of NAG Enterprises. The original application did not specifically mention the All State note, i.e., an asset which may not have been revealed in the opinion of the Committee's attorneys. The subpoenas to witnesses did mention the note; so technically reference to the note was not a part of the application itself. The amended application did make specific reference to the All State note as well as to NAG Enterprises' purchase of Huron's capital stock. The Committee contends that the bankruptcy judge was well aware of the simplicity of cure and that no further review of the amended application was necessary to substantiate entry of the order to reopen the estate.

It is well settled that requests to reopen estates lie within the sound discretion of the bankruptcy court. *Scharmer v. Carrollton Manufacturing Co.*, 525 F.2d 95 (6th Cir. 1975). *See also Maryland Hotel Supply Co. v. Seats*, 537 F.2d 1176 (4th Cir. 1976). It must be determined whether a reasonable prospect of producing unadministered assets exists. *Sterling National Bank* v. *Boyajian*, 127 F.2d 713 (2d Cir. 1942). The purpose of the reopening was to examine Gage and Basil Briggs, a Meridian director. Gage had executed the petition for arrangement and the schedules and Statement of Affairs. Less than five months before filing bankruptcy Gage had received Huron's capital stock, a $700,000 note, and an unconditional guarantee on the note. These two men possessed certain knowledge which in the opinion of the bankruptcy judge justified reopening the estate. The yet unsettled status of the promissory note itself is another factor weighing in favor of the

judge's decision, based on clear, objective factors and well within his sound discretion.

The judgment of the District Court is therefore affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Sara L. Altman
Deputy Clerk

APPENDIX "E"

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed Sept. 17, 1980)

(In the Matter of: Huron Die Casting, Inc., Bankrupt, Creditors Committee of Huron Die Casting, Inc., Petitioner-Appellee, v. Huron Die Casting, Inc. and NAG Enterprises, Inc., Respondents-Appellants. No. 78-1473)

Before: Ewards, Chief Judge; Weick and Martin, Circuit Judges.

On receipt of a motion for reconsideration in the above-styled case; and

The panel having noted nothing of substance in said motion for reconsideration which had not been carefully considered before issuance of the Court's order,

Now, therefore, the motion for reconsideration is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX "F"

APPLICATION TO REOPEN ESTATE

(United States District Court
Eastern District of Michigan
Southern Division)

(In the Matter of: Huron Die Casting, Inc., Bankrupt. No. 74-95212P)

TO: THE HONORABLE HARRY G. HACKETT, Bankruptcy Judge:

Now comes the Creditors Committee of Huron Die Casting, Inc., by and through its attorneys, Rice, Rice & Gilbert, and files this application to reopen estate and says unto the Court:

1. That your petitioners were the duly constituted and acting Creditors Committee in the above captioned court and cause.

2. That on December 11, 1974, Huron Die Casting, Inc. filed a voluntary Petition under Chapter XI of the Bankruptcy Act.

3. That thereafter Huron Die Casting, Inc. consented to be adjudicated as a bankrupt and subsequently these proceedings were terminated pursuant to an Order of this Court on November 19, 1976.

4. That your petitioners are advised and do verily believe that there may be assets which belong to the bankrupt corporation which were not administered during the liquidation proceedings in this estate. More particularly, your petitioners allege upon information

and belief, that this estate may have an interest in certain assets which were not disclosed by the bankrupt to the Court.

4.5 That your petitioners further allege that the facts and circumstances surrounding the concealment of these assets are within the knowledge of Basil M. Briggs, former President and Chief Officer of Meridian Industries, Inc., and Noel A. Gage, either as an officer, director or principal stockholder of NAG Enterprises, Inc., and such facts will be fully disclosed upon examination of the above individuals and such other third parties or agents of Meridian Industries, Inc. and NAG Enterprises, Inc., upon appropriate examinations under Rule 205 of The U.S. Bankruptcy Rules.

5. That in order for this Court to make a determination as to whether the aforesaid assets exist and belong to this estate, it is necessary that after the above estate is reopened, that appropriate examinations by (sic) conducted under Rule 205 of The U.S. Bankruptcy Rules of the principals of Meridian Industries, Inc. and Huron Die Casting, Inc., and other entities who were associated therewith, together with the necessary officers, directors and agents of the aforesaid corporations.

6. That no previous application for relief sought herein has been made to this or any other court.

WHEREFORE, your applicants pray that this estate be reopened, that subpoenas under Rule 205 of the U.S. Bankruptcy Rules be issued requiring the presence of Basil M. Briggs, Noel A. Gage, and any other officers, directors or agents of Meridian Industries, Inc. and

Huron Die Casting, Inc., and that you applicants have such other further relief as this Court deems just and equitable.

RICE, RICE & GILBERT

By: /s/ Arthur H. Rice

Attorney for the Creditors
Committee of Huron Die Casting, Inc.
2956 City National Bank Building
Detroit, Michigan 48226
962-7770

AFFIDAVIT OF ARTHUR H. RICE

State of Michigan
County of Wayne—ss.

ARTHUR H. RICE, being first duly sworn, deposes and says, that he is a member of the law firm of Rice, Rice & Gilbert, attorneys for the Creditors Committee of Huron Die Casting, Inc.

Deponent further says that he has executed the foregoing Application to Reopen Estate and that the facts therein are based upon information and belief.

Deponent further says that additional facts supporting this Application are within the personal knowledge of Basil M. Briggs and Noel A. Gage, officers, directors and agents of the aforesaid corporations, to wit: Meridian Industries, Inc. and NAG Enterprises, Inc., and will appear more fully after the examination of Basil M. Briggs and Noel A. Gage, officers of Meridian

Industries, Inc. and NAG Enterprises, Inc., under Rule 205 of the U.S. Bankruptcy Rules.

Further deponent saith not.

/s/ Arthur H. Rice

Subscribed and sworn to before
me this 3rd day of May, 1977.

/s/ Kathleen L. Scerba
Notary Public, Wayne County, Mich.
My Commission Expires Feb. 28, 1981

APPENDIX "G"

AMENDED APPLICATION TO REOPEN ESTATE

(United States District Court
Eastern District of Michigan
Southern Division)
(Filed June 22, 1977)

(In the Matter of: Huron Die Casting, Inc., Bankrupt. No. 74-95212 H)

TO: THE HONORABLE HARRY G. HACKETT, Bankruptcy Judge:

Now comes the Creditors Committee of Huron Die Casting, Inc., by and through its attorneys, Rice, Rice & Gilbert, and files this amended application to reopen estate and says unto the Court as follows:

1. That your petitioners were the duly constituted and acting Creditors Committee in the above captioned court and cause.

2. That on December 11, 1975, Huron Die Casting, Inc. filed a voluntary Petition Under Chapter XI of the Bankruptcy Act.

3. That thereafter Huron Die Casting, Inc. consented to be adjudicated as a bankrupt and subsequently these proceedings were terminated pursuant to an Order of this Court on November 19, 1976.

4. That your petitioners are advised and do verily believe that there may be assets which belong to the bankrupt corporation which were not administered during the liquidation proceedings in this estate. More particularly, your petitioners allege upon information and belief, that this estate may have an interest in certain assets which were not disclosed by the bankrupt to the court, more particularly as follows:

a) The purchase by NAG Enterprises, Inc. from Meridian Industries, Inc. of the stock of Huron Die Casting, Inc., and

b) The acquisition by NAG Enterprises, Inc. of the various assets of Meridian Industries, Inc., including a Promissory Note dated March 20, 1974, from Allstate Industries, Inc. to Meridian Industries, Inc.

4.5 That your petitioners further allege that the facts and circumstances surrounding the assets described in paragraph 4 above, are within the knowledge of Basil M. Briggs, former President and Chief Officer of Meridian Industries, Inc., and Noel A. Gage, either as an officer, director or principal stockholder of NAG Enterprises, Inc., and such facts will be fully disclosed upon examination of the above individuals and such other third parties or agents of Meridian Industries,

Inc. and NAG Enterprises, Inc., upon appropriate examinations under Rule 205 of the U.S. Bankruptcy Rules.

5. That in order for this Court to make a determination as to whether the aforesaid assets exist and belong to this estate, it is necessary that after the above estate is reopened, that appropriate examinations be conducted under Rule 205 of The U.S. Bankruptcy Rules of the principals of Meridian Industries, Inc. and Huron Die Casting, Inc., and other entities who were associated therewith, together with the necessary officers, directors and agents of the aforesaid corporations.

6. That no previous application for relief sought herein has been made to this or any other court.

WHEREFORE, your applicants pray that this estate be reopened, that subpoenas under Rule 205 of the U.S. Bankruptcy Rules be issued requiring the presence of Basil M. Briggs, Noel A. Gage, and any other officers, directors or agents of Meridian Industries, Inc. and Huron Die Casting, Inc., and that your applicants have such other further relief as this Court deems just and equitable.

RICE, RICE & GILBERT

By Arthur H. Rice (P19401)

Attorneys for the Creditors
Committee of Huron Die Casting, Inc.
2956 City National Bank Building
Detroit, Michigan 48226
962-7770

Dated: June 22, 1977

APPENDIX "H"

11 USC § 350: Closing and reopening cases

(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.

(b) a[1] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."

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[1] So in original. Probably should read "A".

Supreme Court, U. S.
FILED
DEC 1 1980
MICHAEL RODAK, JR., CLERK

No. 80-713

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN THE MATTER OF: HURON DIE CASTING, INC.,
Bankrupt
HURON DIE CASTING, INC., AND
NAG ENTERPRISES, INC.,
Petitioners,
v.
CREDITORS' COMMITTEE OF HURON DIE CASTING, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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CREDITORS' COMMITTEE OF HURON DIE CASTING, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

This Opposition to the Petition for a Writ of Certiorari addressess itself solely to Petitioner's "Reasons for Granting the Writ" — pp. 9-12, Petition.

There is no diversity of views between circuits.

The view is uniformly held that no special formal procedure applies to the reopening of an estate. *In re*

Thomas, 204 F. 2d 788 (7th Cir. 1953); *In re Newton*, 107 F. 429 (8th Cir. 1901); *In re Carlucci Stone Co.*, 269 F. 795 (D.C. Pa., 1920); *In re Snyder*, 4 F. 2d 627 (9th Cir. 1925).

The view is uniformly held that reopening rests in the sound discretion of the Bankruptcy Judge. *Scharmer v. Carrollton Manufacturing Co.*, 525 F. 2d 95 (6th Cir. 1975); *Mohonk Realty Corporation v. Wise Shoe Stores*, 111 F. 2d 287 (2nd Cir. 1940); *In re Butts*, 123 F. 2d 250 (2nd Cir. 1941); 6 Remington on bankruptcy, Section 2972-74.

These views were followed by the District Judge in this case, and by the Court of Appeals in this case:

The District Judge said:

> "We have a situation here while the judge got the cart before the horse, in effect making a decision to reopen on the promise of filing of a petition without examining the petition first, the amended petition or petition that was to be filed. He later on in an adversary proceedings reaffirmed the fact he is satisfied the allegations are sufficient and we are dealing here not with what I think I would do under the circumstances but whether or not there is an abuse of discretion and I must conclude that the abuse — that Judge Hackett did not abuse his discretion in reopening the estate and that will be the Court's determination."

The Court of Appeals said:

> "It is well settled that requests to reopen estates lie within the sound discretion of the bankruptcy

> court. *Scharmer v. Carrollton Manufacturing Co.*, 525 F. 2d 95 (6th Cir. 1975). See also *Maryland Hotel Supply Co. v. Seats*, 537 F. 2d 1176 (4th Cir. 1976). It must be determined whether a reasonable prospect of producing unadministered assets exists. *Sterling National Bank v. Boyajian*, 127 F. 2d 713 (2d Cir. 1942). The purpose of the reopening was to examine Gage and Basil Briggs, a Meridian director. Gage had executed the petition for arrangement and the schedules and Statement of Affairs. Less than five months before filing bankruptcy Gage had received Huron's capital stock, a $700,000 note, and an unconditional guarantee on the note. These two men possessed certain knowledge which in the opinion of the bankruptcy judge justified reopening the estate. The yet unsettled status of the promissory note itself is another factor weighing in favor of the judge's decision, based on clear, objective factors and well within his sound discretion."

The foregoing dispose of the first three of the "Questions Presented" by the Petitioners.

That there was no "evidentiary hearing," which Petitioners assert was in violation of the Due Process Clause, arises from the simple fact that the reopening was for the specific purpose of examining witnesses with knowlege of the facts. That examination, when it occurs, will be in full accordance with applicable law and procedure, and its holding cannot constitute a denial of due process.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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and

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